



March 2, 2001

Ms. Michelle Simpkins
Winstead Sechrest & Minick, P.C.
100 Congress Avenue, Suite 800
Austin, Texas 78701

OR2001-0814

Dear Ms. Simpkins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 144600.

The Brushy Creek Municipal Utility District (the “district”), which you represent, received a written request for “the background materials for all items on the agenda for the Board of Directors meeting scheduled for 14 December 2000.” You state that the district has released some responsive information to the requestor. You contend, however, that certain other documents you submitted to this office as Exhibits B, C, and E are excepted from required public disclosure pursuant to sections 552.103, 552.105, 552.107(1), and 552.111 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

You describe Exhibit B as a memorandum prepared by the district’s attorney “recommending that certain terms and provisions be included in the Annexation Agreement and Service Agreement, should the District decide to annex the Tony Ltd. Land and provide water and wastewater services to such property.” You seek to withhold this memorandum pursuant to section 552.107(1) of the Government Code. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. *See* Open Records Decision No. 574 (1990). In instances where an attorney represents a governmental entity, the attorney-client privilege protects only an attorney’s legal advice or opinion and client confidences. *Id.* After reviewing Exhibit B, we conclude that this document constitutes legal advice and opinion. Accordingly, the district may withhold Exhibit B in its entirety pursuant to section 552.107(1) of the Government Code.

You describe Exhibit C as a memorandum prepared by the city attorney. The memorandum consists of a summary of litigation between the district and the Williamson County Water Company, Inc., including the attorney's "mental impressions and opinions regarding the claims asserted by the District and the affirmative defenses and the counterclaims asserted by the opposing party." You seek to withhold this memorandum pursuant to the "litigation exception," section 552.103 of the Government Code.

A governmental body has the burden of providing relevant facts and documents to show that section 552.103 is applicable in a particular situation. Under section 552.103(a) and (c), the test for meeting this burden is a showing that (1) litigation involving the governmental body is pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

After reviewing the contents of Exhibit C and the related pleadings, we conclude that you have met your burden of establishing that litigation involving the district was pending on the date the district received the records request. We further conclude that the information contained in Exhibit C "relates" to that litigation. Therefore, the district may withhold Exhibit C in its entirety pursuant to section 552.103 of the Government Code.

Exhibit E consists of various e-mail communications, including attachments, between district employees. You contend that these documents are excepted from public disclosure pursuant to sections 552.105(2) and 552.111 of the Government Code.

Section 552.105(2) of the Government Code excepts from required public disclosure "information relating to . . . appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property." Section 552.105 protects information, the release of which would impair or tend to impair the governmental body's "planning and negotiating position in regard to particular transactions." Open Records Decision No. 222 (1979). Whether particular information falls under the protection of section 552.105 is a question of fact, and the attorney general will accept a governmental body's good faith determination that release of certain information would damage its future negotiating position, unless the contrary is clearly shown as a matter of law. Open Records Decision No. 564 (1990).

You assert that the requested information pertains to the district's valuation and appraisal of the Round Rock System, which the district is considering purchasing from the City of Round Rock. You state that the district is "currently determining the value of the Round Rock System in order to begin negotiations with the City of Round Rock regarding the sale of the System" and that the disclosure of the contents of Exhibit E at this time "will detrimentally

affect and damage its negotiating and planning position with regard to the Round Rock System.” We infer from your comments that the district has not yet begun negotiations with the City of Round Rock. Assuming such is the case, and after examining your arguments and the information you have submitted, we find that section 552.105(2) is applicable to some of the information at issue. The district may withhold the information we have marked as coming under the protection of section 552.105(2) of the Government Code.

As noted above, you also contend that Exhibit E is excepted from public disclosure pursuant to section 552.111 of the Government Code, which excepts from required public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. After reviewing the communications at issue, we conclude that the district may withhold the portions the communications that we have marked pursuant to section 552.111 of the Government Code. Those portions of Exhibit E that we have not marked, however, must be released to the requestor.

To summarize, the district may withhold Exhibit B pursuant to the attorney-client privilege as incorporated into section 552.107(1) of the Government Code. The district may also withhold Exhibit C in its entirety pursuant to section 552.103 of the Government Code. Finally, the district may withhold those portions of Exhibit E that we have marked as coming under the protection of sections 552.105(2) and 552.111 of the Government Code, but the remaining portions of Exhibit E must be released to the requestor.¹

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general

¹Because we resolve your request under the exceptions discussed above, we need not address the applicability of the other exceptions you raised.

have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

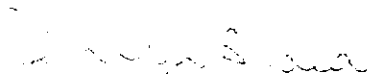
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jennifer Bialek
Assistant Attorney General
Open Records Division

JHB/RWP/seg

Ref: ID# 144600

Encl. Marked documents

cc: Mr. John McLemore
8400 Cornerwood Drive
Austin, Texas 78717
(w/o enclosures)